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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 395

ALASKA STEAMSHIP COMPANY, A CORPORATION, OWNER OF THE AMERICAN STEAMSHIP "DENALI," PETITIONER

v.

PACIFIC COAST COAL COMPANY, A CORPORATION, ET AL., AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 5463–5482) is reported in 23 F. Supp. 145. The original opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 5608–5629) is reported in 105 F. (2d) 413. The opinion of the Circuit Court of Appeals on rehearing (R. 5632–5651) is reported in 112 F. (2d) 952.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered June 30, 1939 (R. 5630). An order granting rehearing was entered January 5, 1940 (R. 5631). In an opinion filed June 7, 1940, the Circuit Court of Appeals on rehearing adhered to its prior ruling (R. 5651). The petition for a writ of certiorari was filed September 4, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

This action was brought by petitioner under the Harter Act for exoneration from damages to cargo resulting from the stranding of petitioner's vessel or, in the alternative, for limitation of liability under Section 4283 of the Revised Statutes. The questions are:

1. Whether petitioner violated Section 2 of the Act of May 11, 1918, providing that no vessel shall be navigated which does not have on board and in her service one duly licensed master and three duly licensed mates who shall stand in three watches while the vessel is being navigated; and if so,

2. Whether the vessel was unseaworthy within the meaning of the Harter Act;

3. Whether petitioner exercised due diligence to make the vessel seaworthy;

4. Whether the violation occurred with petitioner's knowledge or privity within the meaning of Section 4283 of the Revised Statutes; and

5. Whether petitioner was required to show that the violation of the statute could not have contributed to the stranding of the vessel.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra,* pp. 13–15.

STATEMENT

The petitioner, a Nevada corporation, was the sole owner and operator of the steamship *Denali,* a vessel of 3,432 tons gross and 2,164 tons net burden (R. 5448). On May 16, 1935, the *Denali* left the port of Seattle, Washington, with passengers and cargo on a voyage to various ports in Alaska (R. 5448–5449). At 2:44 a. m. on May 19, 1935, the *Denali* stranded on a reef in the waters of British Columbia, Canada, and the vessel and her cargo thereafter became a total loss (R. 5450–5451).

At the time the *Denali* sailed from Seattle, she had on board and in her service a full complement of experienced, licensed deck officers, as required by the certificate of inspection, and, in addition thereto, she had on board and in her service an experienced pilot as an additional watch and navigating officer (R. 5457). The captain, assisted by the second mate, and the pilot, assisted by the third

mate, stood alternate 6-hour watches (R. 5615–5616). The first mate stood no regular watch (R. 1606–1618). As a result, the master, the pilot, and the second and third mates generally, stood 12 hours' watch duty out of 24 hours. While there was testimony that the second and third mates were not "required" to stand watch more than 8 hours each day, the evidence also showed that "customarily" they stood on watch for a longer time (R. 5615–5616). The master and the pilot were, during the period they were on watch, in charge of the vessel, the second and third mates, respectively, acting under their direction (R. 1616–1617). This method of dividing watches was common on the vessels belonging to petitioner, and was well known to the managing officials of the petitioner (R. 1616).[1] At the time the *Denali* stranded, it was in charge of the pilot, assisted by the third mate (R. 5458). The pilot had served 12 hours' watch duty on each of the two preceding days (R. 1616–1618, 5476).

The United States had on board the *Denali* at the time of the stranding, merchandise having a value of $38,760.12 (R. 123–132). The claims of other respondents for loss of cargo exceeded $327,000 (R. 132). Suit was filed by the United

[1] Specific instructions were given by petitioner that upon entering and leaving port, changing courses, etc., the vessel always should be in the control of either the master or the pilot (R. 5617–5618).

States and other respondents as libelants against petitioner, seeking damages for the loss of cargo (R. 5451). Thereafter petitioner instituted proceedings seeking either exoneration under the Harter Act, or, in the alternative, the benefits of the limitation of liability provided for by Section 4283 of the Revised Statutes (R. 5451). The District Court found that the sole cause of the stranding was an error or fault in navigation (R. 5460), and that the petitioner was entitled to exoneration under Section 3 of the Harter Act (R. 5460–5461). On appeal, the Circuit Court of Appeals for the Ninth Circuit reversed, holding, both in its original opinion and again on rehearing, that the three watches required by Section 2 of the Act of May 11, 1918, must be divided equally each day; that the petitioner had violated Section 2 because the second and third mates and the pilot had each stood watch for more than eight hours each day; that the petitioner was not entitled to exoneration under the Harter Act because the vessel, being improperly manned, was unseaworthy, and because the petitioner had failed to show that the improper manning could not have contributed to the stranding of the vessel; and that petitioner was likewise not entitled to limitation of liability because the violation of Section 2 was done with its knowledge and privity, and petitioner had failed to show that the violation could not have contributed to the accident.

ARGUMENT

The petitioner asserts that there was no violation of Section 2 of the Act of May 11, 1918. Petitioner contends, however, that even if it violated the act it was entitled to exoneration, first, because the vessel was seaworthy in fact at the time it broke ground, and that violation of the statute did not, without more, constitute unseaworthiness as a matter of law, and second, because it exercised "due diligence" to make the vessel seaworthy. In the alternative, the petitioner asserts that it is entitled to a limitation of liability because the violation was not committed with its knowledge and privity, and for the further reason that the violation did not contribute to the accident. The court below rejected each of these contentions, and its decision, we submit, was correct in all respects.

1. Section 2 of the Act of May 11, 1918, provides that no vessel in excess of 1,000 tons, such as the *Denali,* shall be navigated without a minimum complement of one licensed master and three licensed mates who shall stand in three watches. The petitioner concedes that under this section "the total time of navigating duty" must be divided equally among the three mates (Pet. Br., p. 5). Petitioner contends, however, that Section 2 applies only to the "mates" and not to the "pilot," and that the requirement of Section 2 is satisfied if the watch of any one mate does not exceed eight hours "on

the average," the only limitation on the number of hours in any one day being the 12 hours maximum prescribed by Section 3 of the same statute. Even in this view, petitioner violated the act, since, as the court below expressly found, the third mate, the one on duty at the time of the accident, and the second mate both stood watch in excess of 8 hours each day, and necessarily therefore in excess of "an average" of 8 hours each day (R. 5616).

Petitioner's construction of the statute, however, is plainly erroneous. The act in question is a safety measure, having as its object the protection of life and property at sea (*cf. O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364, 367; *McCrea* v. *United States*, 294 U. S. 23, 27), and the purpose of Section 2 is to insure the officers in charge of navigation against fatigue and exhaustion while on duty. This purpose would obviously be defeated if the three watch periods, which concededly must be equal, could be divided according to the "entire time of navigation," instead of each twenty-four hours. The 12-hour provision of Section 3 was not intended as the sole regulation of maximum daily hours. Section 3 applies to all licensed officers on the vessel, while Section 2 is a special provision applying only to the mates in charge of navigation.

The contention that Section 2 applies only to the "mates" and not to the "pilot" of the *Denali* is

clearly specious. Although Section 2 speaks only of "mates," the "pilot" of the *Denali* was obviously employed as a "mate" within the sense of Section 2. It cannot be supposed that different hours are prescribed by the act for navigating officers in charge of a watch depending on whether they are licensed as pilots or mates; it is the functions in which the navigating officers are actually engaged which must be determinative. Here the pilot was in responsible charge of the watch at the time of the accident, the third mate being merely his assistant. He was therefore performing the functions of a mate during his watch. And the failure to assign the first mate to a regular watch suggests that it was the intention that the pilot should perform these functions of a mate.

It should be added that the question whether petitioner violated Section 2 is no longer one of general importance. The Congress has since, by the Act of June 25, 1936, c. 816, 49 Stat. 1930, definitely established an 8-hour maximum day for all officers.

2. The court below held that since the vessel was improperly manned it was unseaworthy, that the petitioner had failed to show that the improper manning did not contribute to the accident, and that the petitioner was therefore not entitled to exoneration under the Harter Act. This conclu-

sion was plainly correct. *The New York Marine No. 10,* 109 F. (2d) 564, 566 (C. C. A. 2d); *The Rolph,* 299 Fed. 52, 54 (C. C. A. 9th); *cf. The Lady Pike,* 21 Wall. 1, 15.

The decision of the Circuit Court of Appeals for the Second Circuit in *Hartford & N. Y. Transportation Co.* v. *Rogers & Hubbard Co.,* 47 F. (2d) 189, relied upon by petitioner, is not in conflict. In that case the court held, as an alternative ground of decision, that a vessel was not unseaworthy merely because one of the seamen did not have a license as required by the ship's certificate, where it affirmatively appeared that the vessel was in fact competently manned, that the accident was unavoidable, and that it did not result from any defect of navigation or seamanship (*id.* at 191–192). In this case it is conceded that the accident was caused by faulty navigation, and under the rule of *The Pennsylvania,* 19 Wall. 125, 136, petitioner was required to show that the improper manning did not contribute to the faulty navigation. This, as the court below held, petitioner failed to prove. Petitioner suggests that the rule of *The Pennsylvania* should be applied to collisions only, but the principle announced in that decision is one of general application in the field of admiralty, and in particular has been applied in stranding cases. *Richelieu Navigation Co.* v. *Boston Ins.*

Co., 136 U. S. 408; cf. *Lie* v. *San Francisco & Portland S. S. Co.*, 243 U. S. 291, 298.[2]

The petitioner contends that in any event the violation of Section 2 was not willful, but was done in the bona fide belief that the division of watches was in accordance with the requirements of the statute, and therefore that the petitioner exercised "due diligence" to make the vessel seaworthy within the meaning of the Harter Act. The contention is without substance. Petitioner knew that the illegal practice was the customary method of operating its vessels. The fact that it believed the arrangement to be a proper one as a matter of law is, of course, immaterial. Diligence in this field, as generally, must be measured by an objective standard; whether petitioner exercised due diligence depends on whether it complied with the standard established by Congress, not on whether it believed that it had so complied. *The Pennsylvania*, 19 Wall. 125, 137; *cf. Barlow* v. *United States*, 7 Pet. 404, 410; *W. A. Hover & Co.* v. *Denver, etc., R. Co.*, 17 F. (2d) 881, 884–885 (C. C. A. 8th).

3. Petitioner was not entitled to limitation of liability, since the violation of Section 2 was com-

[2] It may be added that the court in *Hartford & N. Y. Transportation Co.* v. *Rogers & Hubbard Co.*, *supra*, held as an independent ground of decision that even if the vessel were unseaworthy, a causal relation must be shown between the unseaworthiness and the accident, a view which this Court has since expressly disapproved in *May* v. *Hamburg Etc. Gesellschaft*, 290 U. S. 333, 350–351.

mitted with its knowledge and privity, and petitioner failed to prove that this method of operation was not a contributing cause of the accident.

Petitioner's contention that the violation was not committed with its knowledge or privity, because it believed in good faith that the method of operating its vessels conformed to the statute, is without merit. The Limitation of Liability Act merely requires "knowledge" or "privity"; it does not require a "wilful" complicity in the sense of a deliberate intention to do what is known to be illegal. The cases cited by petitioner (*The Virginia,* 264 Fed. 986 (D. Md.), affirmed *sub nom. Hines* v. *Butler,* 278 Fed. 877 (C. C. A. 4th); *La Bourgogne,* 210 U. S. 95) are not in point. They merely hold that "negligence" alone is not enough. They do not hold that a customary practice, of which the owner is cognizant, is engaged in without his "knowledge" or "privity" simply because he believes the practice to be lawful.

Petitioner further contends that the court below erred in holding that it was required to prove that the violation "could not" have contributed to the accident. This holding was in accord with the rule of *The Pennsylvania, supra,* which, as we have shown, is of general applicability in admiralty cases.

CONCLUSION

The decision below is correct and is not in conflict with any decision of this Court or of any other

circuit court of appeals. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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